Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2062

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARGARET L. ACKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: Page

Acker v. *United States*, 620 F.2d 802 4
O'Connor v. *United States*, No. 85-558 (Nov. 4, 1986) 2
Panama Canal Federation of Teachers, Local 29 v. *Reagan*, No. 84-0784 (D.D.C. June 2, 1984) .. 4

Treaties and statutes:

Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, art. II, 33 Stat. 2235 2
Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030 1-2
Defense Department Overseas Teachers Pay and Personnel Act § 7, 20 U.S.C. 905 2
Panama Canal Act of 1979, Pub. L. No. 96-70, § 3(b)(1), 93 Stat. 455, 22 U.S.C. 3602(b)(1) .. 3
Pub. L. No. 98-600, 98 Stat. 3145 (codified at 22 U.S.C. (Supp. II) 3657 4

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Petitioners contend that as employees of the Department of Defense Dependent Schools (DoDDS) in Panama, they are entitled to recover money damages from the government because they were not given government-furnished housing or a housing allowance under a statutory scheme that has since been amended.

1. Petitioners are civilians employed to provide educational services to United States military dependents in the Republic of Panama (Pet. App. 2a). Prior to the effective date of the Panama Canal

Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. No. 10030 (Treaty), petitioners were employed by the Panama Canal Zone Government, an agency of the United States responsible for the administration of local government services in the then-existing Canal Zone. The Canal Zone was an area within the Republic of Panama over which the United States exercised "rights, power and authority [that it] would possess and exercise if it were the sovereign" of the Zone. Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, art. III, 33 Stat. 2235. When the Treaty entered in force on October 1, 1979, the Canal Zone Government was dissolved and Panamanian sovereign power was extended over the area. See *O'Connor* v. *United States*, No. 85-558 (Nov. 4, 1986) slip op. 1. The school system administered by the former Canal Zone Government was transferred to the auspices of the Department of Defense, and the teachers became employees of the DoDDS, a constituent agency of that Department. Pet. App. 2a.

Petitioners brought this damages action in the United States Claims Court. They contend that, upon the transfer of the school system to the DoDDS, petitioners became entitled to the provision of government-furnished housing or a housing allowance pursuant to Section 7 of the Defense Department Overseas Teachers Pay and Personnel Act, 20 U.S.C. 905. The Claims Court and the United States Court of Appeals for the Federal Circuit rejected this claim, concluding that instructors stationed in Panama are not within the defined coverage of the Act (Pet. App. 3a-4a).

2. The court of appeals fully considered petitioners' claim and correctly decided the issues. The decision below does not conflict with any decision of this Court

or of any other court of appeals. In addition, recent amendments have altered the statutory framework so there would be no precedential value to any decision by this Court on the narrow question of statutory construction presented in the petition. In these circumstances, further review is plainly unwarranted.

Contrary to petitioners' contention, the question in this case is not whether petitioners are in some colloquial sense "teachers" who are employed "overseas." Rather, the issue is whether they fall within the defined scope of the Act. The court of appeals accurately summarized the statutory scheme (Pet. App. 3a-4a) (footnote omitted):

> Section 901 of 20 U.S.C. makes it clear that [petitioners] are not "teachers" within the scope of section 905. For the purpose of 20 U.S.C. §§ 910-907, "teachers" is defined as an "individual * * * in a teaching position." A "teaching position" is limited to a position in an "overseas area." "Overseas area," "for the purposes of this chapter," does not include the Canal Zone. Thus, [petitioners] are not "teachers" for the purposes of 20 U.S.C. § 905, because the Canal Zone is not an "overseas area" for the purposes of that section.

Petitioners argue that this express exclusion of teachers employed in the Canal Zone was superseded by the Treaty. But the Panama Canal Act of 1979, Pub. L. No. 96-70, § 3(b)(1), 93 Stat. 455, 22 U.S.C. 3602(b)(1), which implements the Treaty, preserves the pre-existing exclusion by providing that references in earlier statutes to the "Canal Zone" shall be deemed to refer to those "areas and installations in the Republic of Panama made available to the United States." 22 U.S.C. 3602(b)(1).

Even if petitioners could demonstrate a statutory basis for their claim, the Defense Department Overseas Teachers Pay and Personnel Act does not make such housing benefits mandatory. See *Acker* v. *United States*, 620 F.2d 802, 805 n.4 (Ct. Cl. 1980). Accordingly, the DoDDS would retain discretion to grant or deny government housing or housing allowances to petitioners.[1]

Finally, as the court of appeals recognized (Pet. App. 2a n.4), during the course of this litigation Congress amended the Panama Canal Act to permit housing allowances for United States employees stationed in the Republic of Panama. Pub. L. No. 98-600, 98 Stat. 3145 (codified at 22 U.S.C. (Supp. II) 3657). Thus, petitioners are eligible for such benefits in the future at the discretion of the DoDDS (and have been so eligible since the effective date of the amendment, October 1, 1984). In light of that amendment, the sole issue remaining in this case is whether petitioners are entitled to money damages because they did not receive housing benefits under the statutory scheme that existed prior to the recent amendment. Since any decision on that question of statutory construction would have no prospective significance, this case does not warrant an exercise of this Court's discretionary certiorari jurisdiction.

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[1] On March 13, 1984, petitioners' union filed an action in the United States District Court for the District of Columbia seeking injunctive relief that would have provided housing for petitioners. In denying the union's motion for a preliminary injunction, the district court held that the Department of Defense had acted "in a fair and equitable manner" in its administration of housing for DoDDS instructors in Panama. *Panama Canal Federation of Teachers, Local 29* v. *Reagan*, C.A. No. 84-0784 (D.D.C. June 2, 1984), slip op. 18. No appeal was taken from that decision.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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